

**BEFORE THE
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, DC**

Application of)

EW DISCOVER GmbH)

for Blanket Statements of Authorization)

Under 14 C.F.R. Part 212)

(Codesharing with Lufthansa, Austrian Airlines,)

Brussels Airlines, and)

Swiss International Air Lines))

Docket DOT-OST-2021-0081

MOTION FOR LEAVE TO FILE AND REPLY OF EW DISCOVER GmbH

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August 4, 2021

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EW Discover GmbH (“EW Discover”) submits this reply to “Comments” filed by Condor Flugdienst GmbH (“Condor”) regarding the above-captioned application.¹

Condor is asking the Department to intervene in a competitive dispute between two German carriers involving issues that are currently under review by the German competition authority. Condor specifically demands that the Department preempt the German competition authority’s review by initiating its own investigation and taking the extraordinary and unprecedented action of requiring Lufthansa (not EW Discover, the applicant) to interline with Condor. EW Discover asks that the Department disregard Condor’s spurious intervention in this docket and promptly approve EW Discover’s

¹ Comments of Condor Flugdienst GmbH, July 26, 2021 (Docket DOT-OST-2021-0081) (“Condor Comments”). EW Discover hereby moves for leave to file this reply pursuant to 14 C.F.R. § 302.6(c). Good cause exists for the Department to accept this reply in which EW Discover explains why the issues Condor has raised are not germane to the Department’s adjudication of EW Discover’s application.

application for codesharing, as expressly provided for under the applicable air transport agreements.

EW Discover responds more fully to Condor's comments as follows:

1. EW Discover, which is a member of the Lufthansa Group, has submitted an application for statements of authorization to codeshare with four other carriers that also are members of the Lufthansa Group. The Department's approval of the application will enable those carriers to display their respective designator codes on flights EW Discover will operate between Europe and the United States. All of the flights and the related codesharing at issue are within the scope of rights available to EW Discover and the other Lufthansa Group carriers under the U.S.-EU and U.S.-Switzerland "open skies" air transport agreements. The Department routinely grants such applications involving EU and Swiss carriers. EW Discover polled the U.S. carrier representatives on the attached service list and none objected to the application. In fact, no party except Condor responded to the application.²

2. Significantly, Condor does not oppose EW Discover's application, nor does Condor dispute that the requested codeshare authority falls within the scope of the applicable bilateral "open skies" agreements and that prompt approval of the application would be fully consistent with longstanding DOT precedent. Rather, Condor is seeking to insert into this docket non-germane issues relating to Condor's competitive position and commercial interests relative to Lufthansa that have arisen in Germany and are under pending review by the German competition authority. As such, Condor has not

² EW Discover holds an exemption to serve the United States that the Department recently issued pursuant to the U.S.-EU "open skies" air transport agreement and the Department's related procedures for approving such applications on a "streamlined" basis. Order 2021-6-21, June 22, 2021 (Docket DOT-OST-2021-35). Neither Condor nor any other party objected to or commented on that application.

provided any basis for the Department to delay issuance of, or impose unprecedented conditions on, EW Discover's requested statements of authorization.

3. EW Discover's application raises no competitive issues because carriers that are members of the Lufthansa Group do not compete with each other. The proposed codeshare services are simply a way for the Lufthansa Group to enhance the marketing, sale, and distribution of seats available for travel between Europe and the United States on flights operated by EW Discover.

4. Condor is a German passenger air carrier and competitor of Lufthansa. Condor is seeking to inject into this docket issues that are the subject of a pending review by the German cartel office relating to a decision by Lufthansa (not EW Discover) to terminate its special prorate agreement for interlining ("SPA") with Condor. Simply put, Lufthansa made a business decision to exercise a termination right provided by the SPA that had been mutually agreed between the parties. Condor does not allege that Lufthansa has violated the SPA. Rather, Condor asserts that regardless of the parties' agreement with respect to termination rights, Lufthansa should be required to continue the SPA pursuant to German and EU competition rules, a claim that Lufthansa strongly denies and which is under the pending review of the German cartel office (a proceeding that has no relevance to the codeshare application filed by EW Discover with DOT). Additionally, Lufthansa's termination of the SPA does not affect the validity of the underlying bilateral interline traffic agreement ("BITA") between the parties, which is a market-standard agreement for interlining and remains in effect.³ Condor passengers may still book Lufthansa flights through customary channels.

³ Maintaining a BITA-based interlining relationship without an SPA is a common airline industry practice.

5. Condor's demand is that the Department force Lufthansa, a foreign air carrier, to interline with Condor (based on the SPA), another foreign air carrier.⁴ Condor cites no precedent for such drastic action by the Department – because no such precedent exists. On the contrary, DOT precedent regarding mandatory interlining, if anything, supports the Department's rejection of Condor's request for U.S. government intervention into a dispute involving interlining between two foreign air carriers. The only DOT precedent Condor cites in support of its demand for the Department to require Lufthansa to interline with Condor appears in a footnote at the end of the final sentence of Condor's comments.⁵ Condor cites two cases in which carriers requested approval of, and immunity from U.S. antitrust laws ("ATI") for, alliance agreements. As a condition for granting ATI, the Department required the applicants to provide interline access to their networks in U.S.-Australia/New Zealand and U.S.-Canada markets, respectively, to new entrants or another limited category of competitors. Those cases, however, are wholly inapposite here. This is not an ATI case: EW Discover is simply seeking authority to codeshare *with its affiliates*, not ATI or approval to implement an alliance with a competitor. On the contrary, as previously noted, EW Discover's codeshare application raises no competition issues because its codeshare partners are not competitors of EW Discover. The purpose of DOT's limited interlining condition on those grants of ATI was to facilitate new entry into, and competition with those immunized alliances, in non-transatlantic markets, given concentration levels and

⁴ Condor acknowledges that these issues are under pending review by the German cartel office and that Lufthansa and Condor have entered into an interim settlement agreement pursuant to which Lufthansa continues to interline with Condor today. Condor, however, never explains why it would be appropriate for the U.S. government to assume authority over the dispute.

⁵ Condor Comments at 6 n.10.

potential barriers to entry unique to those markets when ATI was granted. The termination of the Lufthansa/Condor SPA does not foreclose or prevent Condor from serving any U.S. market. In addition to Condor, a wide range of carriers has served, and will continue to serve, U.S.-Germany/EU markets, which remain intensely competitive. Those competitors have included carriers that are members of antitrust-immunized and non-immunized alliances, as well as low-cost carriers and other non-aligned carriers. Even in the ATI context, DOT has not imposed an interlining condition such as those referenced by Condor in any transatlantic market.⁶ In sum, Condor's citation of inapplicable ATI cases only serves to underscore the lack of DOT precedent for the extraordinary, and completely unwarranted, condition Condor seeks to impose on EW Discover.

6. A more relevant DOT precedent (which Condor neglects to cite) is *Continental Air Lines, Inc. v. American Airlines, Inc.*⁷ In that case, Continental filed a third-party complaint after American terminated an interline agreement with Continental. Continental accused American of engaging in unfair methods of competition and urged the Civil Aeronautics Board ("CAB"), and subsequently the Department, to require American to interline with Continental. As the Department explained in its decision affirming dismissal of Continental's complaint, when Congress deregulated the airline industry, it rescinded a pre-deregulation statutory "duty of carriers to interline."

⁶ In one case involving an application for ATI for a transatlantic alliance, the Department specifically rejected mandatory interlining because it had "already determined that competitive market forces, not government intervention, should drive business decisions such as interline practices." Application of Delta/Swissair/Sabena/Austrian for ATI, Order 96-5-26, May 20, 1996 (DOT-OST-1995-618), (citing the *Continental/American* Order 85-12-69, at 6 (discussed in paragraph 6)).

⁷ *Continental Air Lines, Inc. v. American Airlines, Inc.*, Order 85-12-69, Dec. 24, 1985 (Docket 42296), 1985 WL 57877 (D.O.T.).

Following enactment of the Airline Deregulation Act (“ADA”), a complaining airline would have to satisfy an onerous burden to justify a governmental requirement for a carrier to interline with a competitor in the context of a deregulated industry in which Congress “intended that the carriers, not the government, should determine their method of operation.”⁸ DOT would not “dictate airline interlining practices.”⁹ Continental failed to meet that burden. The ADA and the *Continental/American* case require the Department to treat with great skepticism a request for mandatory interlining. Regardless, Condor has provided no basis for the Department to take the extraordinary step of requiring interlining in this instance – much less the unprecedented step of mandating a SPA between two foreign carriers, even though these carriers continue to maintain an interline relationship in the form of a BITA.

7. EW Discover respectfully submits that the Department can and should promptly grant EW Discover’s pending application without taking a position on the merits of Condor’s allegations against Lufthansa because those allegations are immaterial to the Department’s review and adjudication of EW Discover’s application. The German cartel office is the appropriate governmental authority to review issues raised by Condor in Germany, which relate to a dispute regarding a contract governed by German law and issues of competition between two German carriers.¹⁰ As a matter of comity with Germany, the Department should not intervene in or preempt the German

⁸ *Id.* at *5.

⁹ *Id.*

¹⁰ Lufthansa denies Condor’s unsupported allegations regarding “anticompetitive conduct” relating to the termination of the SPA, but will not address those allegations here because Lufthansa believes that the German legal system provides the appropriate forum for doing so.

cartel office's review by considering the merits of Condor's allegations; indeed, Condor has cited no precedent to justify the Department taking any such extraordinary action.

* * *

In conclusion, EW Discover respectfully requests that the Department promptly approve EW Discover's application without imposing the unprecedented condition Condor has demanded. Prompt approval of the application will facilitate EW Discover's plans to commence service to the United States in coordination with its codeshare partners, which are also members of the Lufthansa Group.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Arthur J. Molins". The signature is fluid and cursive, with the first name "Arthur" and last name "Molins" clearly distinguishable.

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DATED: August 4, 2021

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Motion for Leave to File and Reply of EW Discover GmbH by electronic mail upon the following:

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DATED: August 4, 2021